NO. 22759

United States Court of Appeals

for the Ninth Circuit

WALTER WILLIAM JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF OF APPELLEE

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COUNTER-STATEMENT OF THE CASE[1]

Defendant's statement of facts is generally sufficient except as specifically noted under appropriate points in our argument.

[1] TR denotes Transcript of Proceedings; D. Br. denotes Defendant's Brief; R denotes record on appeal.

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ARGUMENT

THE STATUTORY PRESUMPTION CONTAINED IN TITLE 21, SECTION 174, UNITED STATES CODE, IS CONSTITUTIONAL BEING NEITHER ARBITRARY OR VIOLATIVE OF DUE PROCESS.

Defendant contends the statutory presumption contained in Title 21, Section 174, United States Code, authorizing conviction on the basis of possession of heroin alone lacks a rational connection between the facts proved and the facts presumed and is thus arbitrary and violative of due process (D. Br. 3).

The cases rejecting defendant's assignment are legion. See for example: *Yee Hem v. U.S.*, 268 U.S. 178 (1925); *Brandford v. U.S.*, 271 F.2d 58 (9th Cir., 1959); *Hunter v. U.S.*, 339 F.2d 425 (9th Cir., 1964); *Pool v. U.S.*, 344 F.2d 944 (9th Cir., 1965); *Agobian v. U.S.*, 323 F.2d 693 (9th Cir., 1963); *Caudillo v. U.S.*, 253 F.2d 513 (9th Cir., 1958); *McIntyre v. U.S.*, 380 F.2d 746 (9th Cir., 1967), U.S. *cert. den.* in 389 U.S. 952; *Morales v. U.S.*, 344 F.2d 846 (9th Cir., 1965); *Erwing v. U.S.*, 323 F.2d 674 (9th Cir., 1963); and *Juvera v. U.S.*, 378 F.2d 433 (9th Cir., 1967).

Defendant's reliance on *Tot v. U.S.*, 319 U.S. 463 (1943) is similarly misplaced. *Caudillo v. U.S.* 253

F.2d 513 (9th Cir., 1958); *Leary v. U.S.*, 383 F.2d 851 868-869 (5th Cir., 1967).

The fact that defendant denied purchasing the capsules found on his person, knowing they were heroin, or had been imported is not controlling (D. Br. 2). It is settled that the mere denial of importation, or knowledge thereof, without more does not, as a matter of law, negative the statutory presumption. *Chavez v. U.S.*, 343 F.2d 85, 89-90 (9th Cir., 1965); *U.S. v. Norton*, 310 F.2d 718, 719 (2nd Cir., 1962); *McIntyre v. U.S.*, 380 F.2d 746 (9th Cir., 1967)

It is similarly clear the jury was not required to accept defendant's unconvincing testimony, particularly in view of his statement that he knew the capsules found in his shirt and trouser pockets contained some type of narcotics (D. Br. 1; TR 55, 76, 77, 80-81).

It must also be pointed out that defendant has chosen to restrict his appeal to an attack upon his conviction under Count I of the Indictment which charges a violation of Title 21, Section 174, United States Code (D. Br. 3, 6; R. 1, 9). Defendant was committed to the custody of the Attorney General on this count for a period of ten (10) years to run concurrently with a sentence of five (5) years imposed upon his conviction under Count II of the Indictment which

charges a violation of Title 26, Section 4704(a), United States Code (R. 1, 9). It is therefore clear, irrespective of the Court's decision on the constitutionality of statutory presumption in Title 21, Section 174, United States Code, the conviction on Count II must either be affirmed or the case remanded solely for the purpose of resentencing.

CONCLUSION

WHEREFORE, on the basis of the above and foregoing, it is respectfully urged the judgment of conviction be affirmed.

Respectfully submitted,

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District of Oregon

CHARLES H. TURNER
Assistant United States Attorney

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Assistant United States Attorney
Of Attorneys for Appellee